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Agency Counsel Newsletter

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GOVERNMENT DOCUMENTS

COLLECTION

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A NOTE FROM THE ATTORNEY GENERAL of Massachusetts Depository Copy

To All Agency Counsel:

As all of you are aware, Paul R. McLaughlin, a prosecutor and member of the Criminal Bureau of my office, was murdered on Monday, September 25, 1995. His death leaves us shocked, deeply saddened, and angered by the senselessness of the tragedy. Paul was an example to everyone in my office -- not just to prosecutors, but to government lawyers on the civil side as well, and indeed to everyone whose life he touched. His unflagging dedication to using the law to improve the lives of ordinary people was truly inspiring, and the force of that inspiration has not diminished one iota in the five months since his death. I thought I would share with you, as fellow lawyers working in the public interest, my thoughts on what made Paul so special and why he is a continuing presence in our daily lives and work.

In my remarks at Paul's funeral, I said he was a hero and a friend. Paul was a hero not just because he fought for justice every day of his life, but because he did so with a devotion and commitment that is only found in a few very special human beings. Those of us who were lucky enough to have known Paul miss him dearly.

I first met Paul in 1983 when he joined my staff at the Middlesex District Attorney's Office. In his eight years there, Paul prosecuted hundreds of cases in the District and Superior Courts for crimes ranging from misdemeanors and minor felonies to arson, rape, assault with intent to murder, and armed robbery. Paul also served in the Public Protection Bureau of the DA's Office for two years, where he was primarily responsible for investigating and prosecuting complex economic fraud, public corruption and drug trafficking cases. From the very beginning, it was apparent that this quiet, reserved gentleman was a consummate professional.

In every facet of his life, Paul exhibited a heightened sense of fairness and loyalty. He was compassionate, dogged,

sensitive, honest and tenacious. He was funny in an understated way, and his only goal was to serve the public by seeking justice. He was, in short, an invaluable prosecutor and friend.

In 1991, Paul joined me at the Attorney General's office. One of our top priorities was to combat urban violence. Paul readily agreed to become one of the founding prosecutors in the Urban Court Strike Force, operating out of the Suffolk County District Attorney's Office. As part of that unit, Paul focused on priority prosecutions involving gang-related activities, particularly targeting drugs, weapons, and violent crimes. He, along with his colleagues, tried to reduce the violence that plague so many neighborhoods in Boston, he tried to combat the infusion of drugs into the urban communities, and he tried to eradicate guns on the streets. He was tremendously successful in his work, obtaining numerous convictions. And although Paul knew that he alone could not solve the problems of urban life, he knew that he could try his best, and that he did, every single day.

But Paul did not consider that his work began and ended in the confines of the Suffolk County courthouse. After many years prosecuting gang cases, Paul saw the need for a comprehensive multi-disciplinary approach to combatting crime in urban neighborhoods. As a result, he specifically asked to be reassigned to the Safe Neighborhood Initiative, a program originally created by my office, in conjunction with the Suffolk County District Attorney's Office, the Boston Police Department, the Mayor of Boston, and residents and businesses in the Dorchester area, to stem the tide of escalating violence and improve the quality of life in designated Dorchester neighborhoods. We designed the project to serve as a model crime-fighting and neighborhood revitalization program. When discussions ensued to expand the Safe Neighborhood Initiative into Roxbury, Paul was once again at the forefront, asking to be assigned there.

And now, because of the efforts of Paul and many other dedicated law enforcement officials and community activists, the Safe Neighborhood Initiative has expanded into the Grove Hall section of Roxbury. In preparation for the project, Paul had become a visible presence in the Grove Hall area, meeting with community members, residents, neighborhood activists, police officers -- all in an effort to fight crime and make the streets safer for everyone. In Paul's memory, we will rededicate ourselves and work even harder to make Grove Hall a successful community project. We will do the same as we begin implementing Safe Neighborhood Initiatives in Brockton and

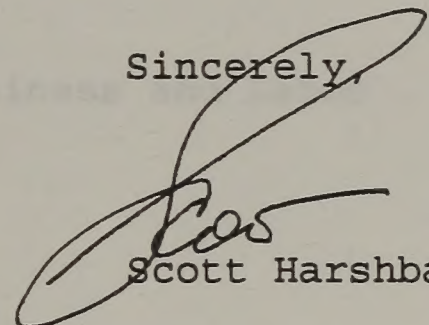
Chelsea and explore the need in other communities. Paul's incredible tenacity will be carried on by other prosecutors, many of whom have spoken to me since his death to say that they will continue to fight against crime with a renewed vigor, and a renewed sense of commitment.

Commitment was the hallmark of Paul's life. He was committed to serving the ends of justice, he was committed to making our urban neighborhoods safer, and he was committed to his friends and family. And although Paul's untimely death is tragic, the outpouring of respect and camaraderie from the legal and law enforcement community only reinforces my belief that Paul's vision of justice and democracy will be reached someday.

At Paul's funeral, I saw hundreds of people, many of whom I knew, many of whom I did not. Each and every person was touched by Paul's life. We must let his light shine on each of our actions, day in and day out, one person and one neighborhood at a time. If we don't, the forces that prefer darkness to light will claim the victory that Paul McLaughlin, a hero of our times, worked so tirelessly to achieve.

As lawyers working to make government serve its citizens, we must not let Paul's death deter us from our goals. His commitment must become our commitment, and his goals must become our goals. We will only strive harder to bring peace to our cities and our state and to use the law as a positive force in our government. In so doing, we will let Paul McLaughlin's light shine forever.

Sincerely,



Scott Harshbarger

A SPECIAL NOTE TO NEW AGENCY COUNSEL

New agency general counsel are invited to contact Sherrie Costa (727-2200, ext. 2071) to set up a meeting with Judith Yogman, Chief of the Administrative Law Division, and Douglas Wilkins, Chief of the Trial Division, to discuss pending and anticipated litigation affecting your agency and other litigation-related issues of mutual interest and concern.

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SOME RECENT CASES

Raisman v. J. Cunningham (Suffolk Superior Court, July, 1995)

In July, 1995, a Suffolk Superior Court judge held unenforceable an agreement by Westfield State College to indemnify the operator of a recreation area for any losses arising out of a student excursion to the area. The court held that such an open-ended agreement to indemnify was a pledge of the credit of the Commonwealth to a private corporation and as such was not authorized by Mass. Const. amend. art. 62, § 1 (prohibiting giving of Commonwealth's credit in aid of any privately owned and managed corporation) and was therefore unenforceable. While this helpful result was the outcome we sought, we advise agencies, in the interests of fair dealing with private vendors and avoiding unnecessary litigation, to leave all such indemnification clauses out of their contracts in the first place.

The case arose out of injuries sustained by a Westfield State College student during an excursion for graduating seniors to a privately owned and operated recreation area. The plaintiff, who was injured when he dove into the shallow end of a swimming pool, sued the operator of the recreation area, the owner of a liquor store which had sold beer to the recreation area, and the Commonwealth. After the plaintiff stipulated to dismissal of his claims against the Commonwealth, the court entered a separate judgment dismissing those claims.

The defendant operator of the recreation area nevertheless asserted cross-claims against the Commonwealth, seeking indemnification pursuant to an indemnification agreement with the College and also seeking contribution. Under the agreement, the Commonwealth (through the College) had agreed to accept all responsibility and defend the recreation area from "any and all loss or costs . . . arising from claims or demands" made against the recreation area for accidents arising out of athletic events or lack of supervisory services there.

The court held that this provision, by guaranteeing payment of an unliquidated amount by the College to the private recreation area, constituted a "giving" of the "credit" of the Commonwealth in aid of a private corporation, in violation of amendment article 62, § 1, of the Massachusetts Constitution, which provides:

"The Commonwealth may give, loan or pledge its credit only by a vote, taken by the yeas and nays, of two-thirds of each house of the general court present and voting

thereon. The credit of the Commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed."

The court relied on the Justices' statement that "scarcely anything can be a more direct giving or loaning of credit than the guaranty of the payment of principal and interest upon obligations of another as they fall due." Opinion of the Justices, 276 Mass. 617, 621 (1931). The court also relied on Lovering v. Beaudette; Massasoit Community College, 30 Mass. App. Ct. 665, 670 (1991) (holding that similar indemnification agreement by a community college was "arguably a pledge of the credit of the Commonwealth in aid of a private individual or corporation" and therefore of doubtful validity).

The court also granted summary judgment to the Commonwealth on the operator's cross-claim for contribution, holding that the separate judgment dismissing with prejudice the plaintiff's original claims against the Commonwealth was the functional equivalent of a release which, pursuant to G.L. c. 231B, § 4, would preclude a claim for contribution by the private operator against the Commonwealth.

In order to avoid unnecessary litigation, we advise all state agencies to omit indemnification clauses like the one at issue in Raisman from future contracts entered into by the Commonwealth. (Contacts: SAAG Jason Barshak in the Trial Division, or AAG Peter Sacks, Deputy Chief of the Government Bureau.)

Advocacy Network, Inc. v. Department of Mental Retardation
(Hampshire Superior Court, October, 1995)

This recent decision affirms the right of public officials to speak out (even critically) on matters of important public interest and demonstrates the importance of early evaluation and proactive handling of cases.

The plaintiff, Advocacy Network, Inc. (ANI), is a non-profit corporation that advocates for the rights of mentally retarded individuals in western Massachusetts and in some cases acts as guardian for particular individuals with mental retardation. In the view of the Department of Mental Retardation (DMR), on a number of occasions since late 1993, ANI had engaged in inappropriate actions in advocating for its wards. A DMR Regional Director prepared two memoranda addressed to all DMR Service Coordinators advising them of

ANI's actions. The memoranda also were presented to the Governor's Commission on Mental Retardation.

The first memorandum noted, in particular, that the Disabled Persons Protection Commission (DPPC), an independent commission authorized to consider complaints of abuse of disabled persons, had recently found that members of ANI had retaliated against a DMR employee who, as a "mandated reporter" under state law, had filed a report of abuse with the DPPC. The memorandum also discussed the fact that ANI had been found in contempt of the Probate Court for failing to file annual accountings on behalf of one of its wards (indicating how the ward's monies had been spent), as required by law.

The ANI and two of its officers sued DMR and five of its employees, including the Commissioner and Regional Director, in both their official and individual capacities. The plaintiffs asserted claims of defamation, invasion of privacy, and civil rights violations.

Soon after the case was filed, our office deposed the two named plaintiffs. At the depositions, plaintiffs reluctantly admitted the truth of all material facts in the memoranda, although they contended that the memoranda distorted the actual events described therein. Based on the plaintiffs' admissions, our office successfully moved for summary judgment for all defendants on all claims.

Concerning the defamation claims, the court noted that the two memoranda contained both statements of fact and statements of opinion. Based on plaintiffs' admissions, the court concluded that the statements of fact were true and therefore non-defamatory. With respect to the statements of opinion, the court reaffirmed the rule that such statements cannot give rise to a claim based on defamation if they are based on disclosed, non-defamatory facts. The opinion expressed in the first memorandum (that "intimidation" by persons in influential positions would have a chilling effect on the willingness of mandated reporters to report abuse) was based on the true factual statement that the DPPC had found that ANI had retaliated against a DMR mandated reporter. Similarly, the second memorandum's expression of concern regarding ANI's advocacy was based on true factual statements concerning the Probate Court's contempt order. The court's ruling that these statements were non-defamatory thus reaffirms that public officials are free to express their opinions where, as here, the opinions are based on disclosed, non-defamatory facts.

The court also rejected the invasion of privacy claim, because the two memoranda neither mentioned plaintiffs by name nor contained other information implicating plaintiffs' privacy interests. The court further concluded that even if the plaintiffs could show a privacy interest in not having the DPPC report disseminated, any such privacy interest would be "heavily outweighed by the strong public policy interest in reporting abuse within the health care system."

The case affirms the right of agency officials to speak out on matters affecting the public interest. In addition, the case provides a useful illustration of the value of well-timed discovery. The forceful approach of taking early depositions of the plaintiffs obtained admissions that likely would have been more difficult (and would have required more time) to obtain through paper discovery. Although taking depositions involves initial costs to the agency, such discovery can yield information crucial to an early resolution of a case, ultimately protecting the Commonwealth from the significant burdens and expenses that result from protracted litigation. (Contact: AAG Douglas Brown, Western Massachusetts Office)

Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Board, 421 Mass. 196 (1995), and Baker v. Department of Environmental Protection, 39 Mass. App. Ct. 444 (1995) (expanding criteria for classifying government charges as "fees" rather than "taxes")

The Supreme Judicial Court and the Appeals Court have recently issued decisions making it easier to classify a charge imposed by government as a valid "fee" rather than an unauthorized "tax." The familiar three-prong test, first announced in Emerson College v. City of Boston, 391 Mass. 415, 424-25 (1984) and amplified in numerous subsequent decisions, is essentially that a fee (1) is paid in exchange for a particularized benefit to the fee-payer; (2) is "voluntary" in the sense that it can be avoided by foregoing the service; and (3) does not produce revenue significantly and consistently in excess of the cost of the service. The two recent decisions loosen somewhat the concepts of particularized benefit and revenue/cost matching, and they de-emphasize the importance of the voluntariness of the charge.

These decisions should afford additional latitude to agencies in seeking to finance a particular government service through a "fee" imposed under the broad authority of G.L. c. 7, § 3B or any other statute authorizing the agency to charge

fees. Under G.L. c. 7, § 3B, the Secretary of Administration and Finance (A&F) is to determine, after notice to the Legislature and a public hearing, the amount to be charged for "each service of any kind performed by any state personnel or agency which is primarily for the benefit of any individual person or corporation," other than certain health and correctional services; "each use for private purposes or gain of state-owned buildings, houses, facilities, and equipment"; and "any other service, registration, regulation, license, fee, permit or other public function," except for higher education tuition and court filing fees.

In the first recent decision, Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Board, 421 Mass. 196 (1995), the Supreme Judicial Court agreed with the state Board that the fee assessed on in-state radioactive material users, the revenue from which is used to fund the Board's search for a solution to the state's low-level radioactive waste disposal problem, is a valid regulatory fee rather than an invalid tax. Of special interest here is the court's holding that government planning for the probable future needs of regulated entities is, under some circumstances, a service for which a fee can presently be imposed on those regulated entities. Id. at 203-04.

The Nuclear Metals court also held that, although the only way the regulated entity could avoid the fee was to give up the regulated line of business, this did not make the fee "involuntary" in any legal sense. The court downplayed the importance of the "voluntariness" criterion of Emerson College, holding instead that when a fee is imposed to defray the costs of regulation in the public interest, "the element of choice is not a compelling consideration which can be used to invalidate an otherwise legitimate charge." Id. at 206 (emphasis added). The court specifically noted that Berry v. Town of Danvers, 34 Mass. App. Ct. 507 (1993), which invalidated a sewer connection fee partly on the ground that sewer connections were legally required and thus the fee was "involuntary," was not consistent with controlling Supreme Judicial Court precedent. Nuclear Metals, 421 Mass. at 206 n.11. Rather, even if the only way to avoid a charge is to forego the development of one's property, the charge may still qualify as "voluntary" for purposes of determining whether it is a fee or a tax. Id.; see Bertone v. Department of Public Utilities, 411 Mass. 536, 549 (1992).

Finally, the Nuclear Metals court clarified that a charge may be a fee even where some of the services it pays for do not immediately benefit the fee-payer in the most obvious sense. Specifically, the court agreed that the Board could use fee

revenues to fund public education programs and to employ a public information coordinator, because these expenditures would increase public acceptance of the possible need to locate a low-level waste disposal site in the Commonwealth. The court said that this public acceptance "directly benefits a generator of low-level radioactive waste" and thus could be funded by a fee charged to that generator. 421 Mass. at 207 (emphasis added). This holding indicates the court's willingness to take a broad view of what kinds of services can be funded through a fee. Not only the core service to the fee-payer, but also those services reasonably related to the core service and designed to make it more efficacious, can be paid for with fee revenues.

In the second recent decision, Baker v. Department of Environmental Protection, 39 Mass. App. Ct. 444 (1995), the Appeals Court upheld the filing fees paid to local conservation commissions and the state DEP in connection with notices of intent and other filings under the Wetlands Protection Act, G.L. c. 131, § 40. The court agreed that although protection of wetlands is a public benefit, a landowner developing land near wetlands obtains a particularized financial benefit from the development and therefore can be charged a fee for the permit necessary to ensure that the development does not damage wetlands. 39 Mass. App. Ct. at 446. The court also held that the fee was voluntary, even though the only way to avoid it might be to forego development of the land. It was permissible for a regulatory fee to have the effect of discouraging particular conduct by making it more expensive. Id.

In addition, the Baker court agreed that a fee may "offset general agency expenses, as well as the specific costs of the service in relation to each person charged a fee." Id. This does not mean that expenses unrelated to the service may be recovered through a fee; it simply means that a fee need not be limited to the marginal cost of providing the service to one individual. The fee may also cover that portion of an government's "overhead" costs that can reasonably be connected to the provision of the service in question. Id. at 446-47.

Finally, although the plaintiffs in Baker challenged primarily the notice of intent fees (as opposed to other wetlands filing fees) paid to DEP, the Appeals Court refused to confine its comparison of revenues and costs to the particular narrow focus preferred by the plaintiffs. "We look not at each specific service provided and the corresponding fee to that service, but rather 'with a view to reimbursing the [government agency] for all expenses imposed on it by the business sought to be regulated.'" Baker, 39 Mass. App. Ct. at 447 (emphasis

added) (quoting Emerson College). The relevant comparison is thus the aggregate fee revenues and the aggregate costs of an entire set of related services offered by a particular government agency. The agency has some latitude in setting its fees and will not be required to demonstrate that the revenues for each specific fee are no greater than the costs of the specific corresponding service.

In sum, both Nuclear Metals and Baker should make it easier to establish that charges for some state government services are "fees" rather than unauthorized taxes, both with respect to the types of services for which fees can be charged and the range of expenses that fee revenue can be used to cover. Although primary responsibility for setting state fees (and thus for applying these criteria) belongs to A&F under G.L. c. 7, § 3B, agencies may want to reevaluate their existing fee structure in light of Nuclear Metals and Baker to determine if A&F should be asked to change any existing fee levels or to authorize any new fees. (Contact: Peter Sacks, Deputy Chief, Government Bureau)

LESSONS WE'VE LEARNED

Court Awards of Interest Against State Agencies

The Attorney General's office has seen a number of recent cases, primarily those seeking judicial review of agency adjudicatory decisions, in which a court has ordered a state agency to pay interest on some monetary amount that the court has determined is due the plaintiff. As set forth below, the circumstances in which such an award of interest is permissible are very limited, and once the relevant law is explained to the court, the award of interest is usually eliminated from the judgment. Occasionally our office has been called into cases handled by agency counsel appointed as Special Assistant Attorneys General (SAAGs) to file post-judgment motions for this purpose.

Agency counsel who file memoranda on the merits in such cases are reminded to note this point briefly in their memoranda. This should eliminate the need for the agency counsel or our office to file post-judgment motions that use up already-scarce litigation resources.

Sovereign immunity bars an award of pre- or post-judgment interest against the Commonwealth or its agencies absent specific, affirmative statutory authority. E.g., Robinson v

Teachers' Retirement Board, 414 Mass. 340, 342 (1993); Onofrio v. Department of Mental Health, 411 Mass. 657, 659 (1992); C&M Construction Co. v. Commonwealth, 396 Mass. 390, 392-93 (1985); Broadhurst v. Director of the Division of Employment Security, 373 Mass. 720, 725-27 (1977). Although an award of interest is permissible in actions of contract, e.g., Sargeant v. Commissioner of Public Welfare, 383 Mass. 808, 814 (1981), the Supreme Judicial Court has concluded on several occasions that obligations imposed purely by statute are not obligations of "contract." Sargeant, 383 Mass. at 814 (citing Broadhurst, 373 Mass. at 727). "For a contract to arise from a statute there must be a clear intention of the Legislature that a statute be so interpreted." Town of Milton v. Commonwealth, 416 Mass. 471, 475 (1993) (rejecting "contract" claim based on statute).

Thus, even where a court reverses, modifies, or remands an agency decision in such a way as to make clear that the plaintiff is entitled to the payment of money from the agency, that payment should not include interest unless either (1) specifically required by a statute applicable to the agency or program, or (2) the agency's obligation to pay money is contractual, rather than merely statutory, in nature. We note that in one recent case concerning interest, the Appeals Court seemed to accept a somewhat looser approach to the concept of "contract" than could be expected based on the cases cited above. Codman & Shurtleff, Inc. v. Commissioner of the Department of Employment & Training, 36 Mass. App. Ct. 330, 332-34 (upholding award of interest on DET's refund to employer of erroneous assessment of unemployment insurance contributions under G.L. c. 151A), rev. denied, 418 Mass. 1102 (1994). Agencies should be aware of this case but should not assume that it will be applied outside of the specific statutory context in which it arose; we believe that the case can and should be narrowly construed. If a case arises in your agency in which Codman & Shurtleff appears to be applicable, please contact us prior to the filing of any brief on this issue.

One reason that the problem of interest arises is that on occasion a court reviewing an agency adjudicatory decision has entered an actual monetary judgment against the agency, rather than reversing or modifying the decision or remanding the matter to the agency for further action. The entry of a monetary judgment may automatically lead the clerk of the court to assume that pre- or post-judgment interest is available and should be mentioned in the judgment. But nothing in G.L. c. 30A, § 14, or G.L. c. 249, § 4, authorizes a reviewing court to enter a monetary judgment, as opposed to setting aside an agency's decision, remanding a matter to an agency, or issuing the other types of orders authorized by G.L. c. 30A, § 14(7).

If a court enters a monetary judgment, a motion should be filed to amend the judgment appropriately. If the clerk does add interest to the judgment, a motion to delete the award of interest should be filed under Mass. R. Civ. P. 60(a), see Dinsdale v. Commonwealth, 39 Mass. App. Ct. 926 (1995) (rescript), and not under Rule 60(b)(1), (4), or (6). Charles Choate Memorial Hospital v. Commissioner of Public Welfare, 13 Mass. App. Ct. 1080 (1982) (rescript).

We do not recommend that agency counsel devote any substantial space in a memorandum on the merits to the issue of interest, because an extended discussion of the interest issue could obviously be viewed by the court as a sign that the agency expects to lose the case on the merits. Ordinarily it should be sufficient to add a brief mention, perhaps as a footnote to the conclusion of the memorandum, of the unavailability of interest regardless of the result on the merits. Agency counsel who have questions about whether interest is available in a particular type of case handled by their agency should feel free to contact us. (Contact: AAG Peter Sacks, Deputy Chief of the Government Bureau)

Bid Disputes: The Attorney General's New Role and How It May Affect Your Agency

The Legislature has transferred oversight of the public construction bid process from the Commonwealth's Department of Labor and Industries to the Office of the Attorney General. St. 1993, c. 110, §§ 269, 331. It is now the responsibility of the Attorney General's Fair Labor and Business Practices Division (FL&BP) to ensure that designer selections, public works construction and building construction projects are procured in accordance with G.L. c. 7, §§ 38C-38N (designer selection), c. 30, § 39M (public works construction) and c. 149, §§ 44A-44J (building construction).

The transfer of oversight responsibility raises particularly interesting issues in instances where a bid protest is filed with FL&BP and the awarding authority is a state agency which normally is represented in litigation by the Attorney General's Trial Division. In an effort to address these issues, the Attorney General has developed the protocol set forth below, which will be followed in most (but not necessarily all) circumstances and which is subject to revision in light of experience:

(1) Upon receipt of a bid protest in which the awarding authority is a state agency (and assuming that the bid protest requires a bid protest hearing to decide the issues raised therein), FL&BP will inform, in writing, all involved parties (i.e., the awarding agency and the project bidders) of the date and time for the bid protest hearing.

(2) The Trial Division will be copied on such correspondence but at no time will it be involved in the FL&BP bid protest hearing. In addition, FL&BP and the Trial Division will not, at any time prior to the issuance of a bid protest decision or the filing of a lawsuit related thereto, engage in discussions regarding the factual or legal aspects of the bid protest.

(3) As a condition of the commencement of the bid protest hearing, all involved parties will be required to sign an agreement providing that no court action(s) will be filed prior to the issuance of the FL&BP bid protest decision in the matter. The awarding agency must also agree not to execute the project contract prior to the issuance of the FL&BP bid protest decision or before a date certain established by the parties.

(4) Shortly after the conclusion of the bid protest hearing, FL&BP will issue a bid protest decision to all parties.

(5) If, as usually happens, the awarding agency follows the FL&BP decision, the Trial Division will represent the agency in the event of any ensuing litigation (e.g., an aggrieved bidder filing a court action).

(6) In the infrequent event that the awarding agency elects not to follow the FL&BP decision, FL&BP may institute proceedings in the Superior Court to require compliance with its determination.

(7) (a) Whether or not FL&BP files a court proceeding to enforce its decision, it should be noted that, in the event of any other subsequent litigation related to the matter, the Attorney General will not directly represent, advise or counsel any awarding agency that acts in a manner contrary to a FL&BP bid protest decision. In such a situation, the Trial Division's sole function will be to determine whether or not to authorize the appointment of a special assistant attorney general (either agency staff counsel or, under special circumstances, outside legal counsel

engaged at the agency's sole cost and expense) to represent the awarding agency.

(b) The Trial Division's determination in this regard will depend upon whether it finds that the awarding agency's position, although contrary to the FL&BP bid protest decision, can be construed as raising legitimate legal and/or factual claims or issues.

(c) If the Trial Division finds that the agency's position can be construed as raising legitimate claims or issues, it will authorize the appointment of a special assistant attorney general for agency representation. If the Trial Division finds that the agency's position cannot be construed as raising legitimate claims or issues, a special assistant attorney general will not be appointed, and the agency's position will not be defended in court.

If you have any questions with respect to this protocol, or its applicability to a particular set of circumstances, please contact AAG Francis X. Flaherty, Jr., in the Fair Labor and Business Practices Division.

THE ATTORNEY GENERAL'S PRIORITIES

Attorney General Establishes Business and Labor Protection Bureau

The Attorney General established a new Business and Labor Protection Bureau in April, 1995, by joining several existing divisions and units formerly within the Criminal Bureau. Stuart Rossman, formerly Chief of the Trial Division of the Government Bureau, was named by the Attorney General as Chief of the Business and Labor Protection Bureau. The new Bureau includes the following divisions and units, headed by the Assistant Attorneys General indicated: Medicaid Fraud Control Unit (Nick Messuri, Deputy Chief); Fair Labor and Business Practices Division (Brian E. Burke, Chief); Division of Employment and Training (Elizabeth Foley, Chief); and Insurance Fraud Division (John Ciardi, Chief).

The new Bureau brings together the foregoing Divisions because they share common criminal and civil enforcement responsibilities and the common goal of establishing a level playing field in the economic sector for individuals and businesses alike. In their efforts to achieve that goal, the

Divisions that make up the Business and Labor Protection Bureau interact extensively with public and private insurers, providers, employers and labor organizations. The newly formed Bureau also enables the various Divisions to coordinate their diverse practices in order to target fraudulent business activities; such fraudulent activities result in a "fraud tax," which unfairly increases the costs and expenses of honest businesses, insurance policy holders and taxpayers in Massachusetts. Some examples of such fraudulent business activities targeted by the Bureau include casualty and worker's compensation insurance fraud, failure to pay mandated wages, health care fraud, and unemployment insurance fraud.

In order to maximize its overall impact and effectiveness, the Business and Labor Protection Bureau will tap the legal and investigative resources available in all of its Divisions, each of which is experienced in prosecuting fraud. Investigations of one type of fraud by the Bureau will result in further examination of potential fraud in other areas. Thus, for example, if the Bureau receives a complaint concerning a violation of the prevailing wage law by a company, the Bureau will investigate the company's payroll and financial records to determine whether the company has perpetrated tax and insurance fraud as well.

The Business and Labor Protection Bureau is located at 200 Portland Street in Boston. The Bureau also maintains offices in the Western Massachusetts Division of the Attorney General's Office in Springfield. For further information concerning the Business and Labor Protection Bureau, contact Stuart Rossman, Chief of the Bureau, or one of the Bureau's Division Chiefs listed above.

The Clean State Initiative

The Attorney General recently submitted a "State of Clean State" report to the Governor and the Legislature on state agency and independent authority compliance with the environmental laws under Executive Order 350. The report is a comprehensive examination of the program and the progress made in correcting the Commonwealth's environmental problems. The report concludes that while some significant projects have been accomplished, only a handful of the state's high priority environmental problems have been addressed to date. It will take a dedicated and concentrated effort by the agencies and authorities over the next several years for the most serious violations to be remedied.

The report makes a number of recommendations. First and foremost is the need to build the necessary infrastructure within each secretariat and authority to insure that environmental awareness and compliance become an integral part of its mission. Compliance with the environmental laws requires knowledge of the laws, clear lines of day-to-day environmental responsibility, and systems to ensure daily compliance at each facility.

In order for existing problems to be recognized and new problems prevented, there is a general need for environmental training and education at state facilities. While there were some advantages to delegating the initial identification of Clean State problems to the agencies themselves, it is now clear that many environmental matters were reported that are not in fact problems, while other serious violations were overlooked completely. Close to 50% of the priority matters examined by Camp, Dresser and McKee, an environmental consultant, were not substantiated as actual problems. Conversely, facility inspections by DEP continue to uncover numerous new violations that need to be added to the Clean State list. A large number of state facilities failed to identify any environmental problems, and it is likely that many more environmental matters exist than have been reported to date.

Armed with increased knowledge of environmental laws and compliance issues, agencies and authorities should inspect all of their respective facilities. This will enable them to address state environmental problems in a timely manner, to prioritize remediation and budget fiscal resources, and to prevent future violations. Agencies should also apply knowledge gained from a DEP inspection of one facility to similar facilities within their purview. The report found that virtually every facility was in need of training on hazardous waste management issues.

The implementation of Executive Order 350 has also been hampered by inaccurate and incomplete reporting on Clean State matters. Many agencies are not reporting on each matter or are reporting in only a cursory manner in their "quarterly reports." Complete reporting is essential, not only to enable the Attorney General to evaluate progress, but also because experience has shown that comprehensive reporting correlates closely with real progress under Clean State. Ideally, action plans for remediating at least the priority matters should be in place and agencies and authorities should detail in the quarterly reports: the work to be done; the contracts executed

for the work; the estimated time to complete each stage of the work; the specific beginning and ending dates for the remediation; funding information; and steps taken that quarter.

Also, information that was contained in past "hard copy" reports needs to be transferred to the electronic database that is being phased in. Presently, only cursory information is contained in the computer-generated quarterly reports. Unless the name of the facility, its location and the matter type is entered in the computer reports, it is difficult to discern on what matter an agency is reporting. This is especially true of those agencies that have dozens of facilities on the Clean State list.

Recent Clean State funding figures are encouraging. Of the roughly \$38.7 million that the Governor's office estimates it will cost to achieve compliance for the priority matters by the end of FY 97, \$30.6 million in existing funds has been identified for this purpose. Additional funding is being sought in bond bills pending before the Legislature. Accurate cost estimates for the non-priority matters still need to be developed. Since problems costing less than \$50,000 to correct are expected to be addressed out of agency operating budgets, agencies need to make a commitment to expend such funds on Clean State matters.

Some significant projects have been accomplished at state facilities under Clean State. On the planning side, a number of agencies have hired environmental consultants and entered into remediation contracts. Clearly some agencies and authorities have taken the mandate of Clean State to heart and have made real progress in addressing their outstanding problems. Others have been much slower to respond.

Approximately half of the matters that have been removed from the Clean State list were removed because they were listed in error (i.e., duplicates or no actual problem). The majority of the matters that have been resolved to date have involved asbestos and underground storage tank removals accomplished under DCPO contracts and smaller inexpensive matters. While it is understandable that agencies would address their smaller, less expensive problems first, attention now needs to focus on the more serious and costly violations.

Agencies can take a number of steps now to prevent new matters from occurring and existing matters from worsening. The longer environmental violations continue, the greater the environmental damage and cost of remediation may be. Matters that can be corrected relatively inexpensively and that may

result in significant cost savings in the long run, such as hazardous waste management and storage violations, should be addressed immediately. Transformers that may contain polychlorinated biphenyls (PCBs) need to be promptly investigated; tightness testing of non-compliant underground storage tanks should be conducted to determine if leakage is occurring. A number of facilities lack vapor collection and control systems on their fuel dispensing equipment, in violation of state air pollution regulations.

The Attorney General believes that state facilities should have a reasonable period of time to correct environmental violations -- but not an indefinite period. Clean State requires that agencies and authorities plan and act now to achieve compliance and stop ongoing pollution of our natural resources. Massachusetts can lead the way on both the state and national level with its commitment to environmental responsibility. While some strides have been made, there is still a long way to go before the goal of a truly Clean State is achieved. With renewed effort and dedication by the agencies and authorities this program can be a success.

Copies of the Attorney General's report to the Governor and the Legislature can be obtained by contacting AAG Margaret Van Deusen in the Environmental Protection Division.

MATTERS OF CURRENT INTEREST

Reminder to Agency Counsel About Appeals Coordination Protocol

In an effort to regularize and improve the handling of appeals on behalf of the Commonwealth, the Attorney General in May, 1994, established an appeals coordination protocol for all appeals within the responsibility of the Government Bureau. The protocol applies to all appeals in which a party is represented by an AAG in the Government Bureau, as well as by a SAAG in a case which otherwise would be handled within the Bureau. The salient components of the protocol are as follows:

1. Decision to Appeal. A SAAG wishing to appeal an adverse final judgment or decision must forward a copy of the judgment or decision, along with a memorandum stating the grounds for an appeal, to the Government Bureau's Appeals Coordinator. The Appeals Coordinator, in consultation with the SAAG and agency, will decide whether to authorize the appeal. Debatable or controversial decisions on whether to appeal may be referred by the Coordinator to the appropriate Division

Chief. A notice of appeal should not be filed until such time as authorization has been obtained.

2. Appeal Tracking. A SAAG handling an appeal, as appellant or appellee, should notify the Coordinator of critical dates in the appeals process, including notice of appeal, assembly of record, docketing of appeal, settlement or mediation sessions, due dates for briefs, and oral argument.

3. Consultation and Brief Reviews. SAAGs should feel free to consult with the Coordinator on questions arising out of an appeal, and should consult with the Coordinator prior to any settlement conference or mediation session. Briefs written by SAAGs will be assigned to a reviewer by the Coordinator. A substantially completed draft must be sent to the Coordinator at least five days prior to the due date, along with a copy of appellant's brief where the agency is appellee.

4. Moot Court. The presumption is that every appeal, unless submitted to the court on the briefs, will go through a moot court prior to argument. The Coordinator will set up moot court panels for appeals handled by SAAGs. Notice of a scheduled oral argument, therefore, must be sent to the Coordinator at least seven days prior to the argument, along with copies of all briefs.

If you have any question about the protocol or a particular case, please contact the Appeals Coordinator, AAG Edward Rapacki.

Attorney General Phases Out State Contract Approval Role

At one time, the Attorney General's office provided substantially all legal services for state agencies. During that time, the Attorney General's office began the practice of reviewing state contracts "as to form," a practice that has continued to this day for some agencies and for some types of contracts. Now, however, most state agencies employ their own legal counsel. Agency counsel typically provide legal advice to state agencies in a wide range of non-litigation areas. Reviewing contracts to ensure that they are in proper form falls into this category.

Although certain contracts, particularly those for legal services, require Attorney General approval by statute or regulation, our review of the law has revealed no generally

applicable requirement of Attorney General approval of contracts as to form. Accordingly, as of February 15, 1996, we will no longer routinely review contracts other than those for legal services and those that, by statute or regulation, require Attorney General approval.

Contracts for legal services have been and will continue to be required to be submitted to the Attorney General's office for approval, pursuant to both statute and regulation. 801 C.M.R. § 20.04 (7) provides:

a Contract for Legal Services . . . must also be approved by the Attorney General's Office (AGO) prior to submission of the Contract to the Office of the Comptroller. Such approval must be in writing and may be made on the SR [Service Request Authorization] on the Contract or by attachment thereto.

This regulation applies to all executive branch agencies. The legislative and judicial branches, other constitutional offices, the public institutions of higher education, and independent public authorities are excluded. 801 C.M.R. § 20.01.

It is critical that agency counsel continue to review contracts to ensure they are in proper form as outlined in the Commonwealth's Expenditure Classification Manual. Contracts that are not in proper form may be rejected by the Comptroller and may lead to litigation and possible liability for your agency.

In order to assist agencies in the contract review process, this office intends to take several steps. First, at the next Agency Counsel meeting on February 9, there will be a presentation on state contracting requirements. Second, in conjunction with the agency counsel meeting, we will be distributing a handbook on state contracting requirements. Finally, this office will remain available to answer questions from agency counsel and agency contracting staff on particular contracts or issues as they arise. (Contact: AAG Jim Sweeney, Trial Division)

Upcoming Training Sessions

1. All agency counsel, especially including those with Special Assistant Attorney General appointments, are invited to attend the following training sessions for Government Bureau AAGs. Contact Maureen Shea, 727-2200 ext. 3340, for further information.

Immunity Defenses -- February 28, 3-5 p.m., Room 3, 21st floor, One Ashburton Place. This program will address state law immunity defenses, including sovereign immunity (to both legal and equitable relief) and good faith immunity. The program follows up on a recent training on absolute and qualified immunity defenses, the materials from which are still available (see next section).

Settlements -- March 20, 3-5 p.m., Room 3, 21st floor, One Ashburton Place. This program will address the various methods of memorializing settlements of lawsuits (e.g., stipulations of dismissal, agreements for judgment, settlement agreements, releases, and consent decrees); the factors to consider in choosing among these methods; and the preparation of the necessary documents.

Preliminary Injunctions -- (time and place to be announced). This program will cover the preparation, presentation, and defense of preliminary injunction motions and associated interlocutory appeals.

2. ADA Without Fear: Solutions for State and Local Governments -- May 13 and 14, 1996, Royal Plaza Hotel, Marlborough, Massachusetts. Choose from dozens of practical workshops and special interest forums to learn about solutions to common Americans with Disabilities Act issues. Register for one or two days. Call 617/727-7440 or 617/695-1225, ext. 0, for information and a brochure. The training is sponsored by the Massachusetts Office on Disability and the Adaptive Environments Center under a grant from the United States Department of Justice. Co-sponsors include the Attorney General and several other state agencies. The contact in the Attorney General's office is AAG Stan Eichner, Director of the Disability Rights Project in the Civil Rights Division.

**RESOURCES AVAILABLE FROM
THE ATTORNEY GENERAL**

Written Materials

Below is a summary of some of the written materials that our office makes available to agency counsel, with a note on how to obtain them. Items described in the "New Materials" section immediately below are new items that have not been described in previous issues of the Agency Counsel Newsletter. Items listed in the "Additional Materials" section are items that have been described more fully in a previous issue; for more information on those items, call the contact person. All contact persons may be reached through our main telephone number, 727-2200.

New Materials

1. Absolute and Qualified Immunity -- These materials from a January 1996 training session include: (1) an outline of the different types of absolute immunity, including, of particular interest to agency counsel, immunity for agency officials acting in quasi-adjudicatory, quasi-legislative, and prosecutorial capacities; and (2) a discussion of qualified immunity defenses, including their elements, how to raise and support them, and their applicability to federal and state claims. A videotape of the training session is also available. (Contact: Sherrie Costa, Administrative Law Division)

Additional Materials

1. Government Bureau Training/Updated 10/93-4/94 (Contact: Sherrie Costa, Administrative Law Division)
2. The Public Records Law--A User's Manual (Revised) (Contact: Betty Lamacchia, Consumer Protection/Antitrust Division)
3. Boston Bar Association Civil Litigation Standards -- (Contact: Sherrie Costa, Administrative Law Division)
4. Employment Rights of Individuals With Disabilities -- (Contact: Sherry Dong, Paralegal in the Civil Rights Division)

5. Eminent Domain and Contract Interest Statutes--Recent Amendments -- (Contact: AAG Douglas Wilkins, Chief of the Trial Division)
6. Report of the Trial Division's Settlement Task Force -- (Contact: AAG Thomas Bean, Administrative Law and Trial Divisions)
7. Guidelines for Agency Counsel-Attorney General Relations in Defensive Litigation -- (Contact: Sherrie Costa, Administrative Law Division)
8. Sexual Harassment: Policy and Training Materials -- (Contact: Geeta Prasad, Paralegal in the Civil Rights Division)
9. Title II of The Americans with Disabilities Act -- (Contact: Sherry Dong, Paralegal in the Civil Rights Division)
10. Chapter 30A/Administrative Law Training (Contact: Sherrie Costa, Administrative Law Division)
11. Brief Bank -- (Contact: Sherrie Costa, Administrative Law Division, or come to One Ashburton Place, Room 2019, and browse)
12. Government Bureau Form Files -- (Contact: Sherrie Costa, Administrative Law Division, or come to One Ashburton Place, Room 2019, and browse)
13. State Administrative Decisions: How to Write Them, Challenge Them or Defend Them -- (Contact: Sherrie Costa, Administrative Law Division)
14. Compendium of Government Law -- (Contact: Sherrie Costa, Administrative Law Division)
15. Protecting Agency Personnel from Depositions -- (Contact: Sherrie Costa, Administrative Law Division)
16. The Massachusetts Tort Claims Act -- (Contact: AAG Douglas Wilkins, Chief of the Trial Division)
17. Discovery Practice and Procedure -- (Contact: AAG Douglas Wilkins, Chief of the Trial Division)
18. Government Bureau Report -- (issued every two months; contact Sherrie Costa, Administrative Law Division)

19. Notes on Relations between the Attorney General and Agencies -- (Contact: Sherrie Costa, Administrative Law Division)
20. Guidelines for Formal Attorney General Opinions -- (Contact: AAG Judy Levenson, Opinions Coordinator, Administrative Law Division)
21. Open Meeting Law Guidelines -- (Contact: AAG Maurice Cunningham, Executive Bureau)
22. Soliciting Signatures on Nomination Papers and Initiative Petitions on Public Property -- (Contact: AAG Peter Sacks, Deputy Chief of the Government Bureau)
23. Civil Litigation Guidelines -- Copies of the Guidelines have already been sent to agency counsel; additional copies are available from Sherrie Costa in the Administrative Law Division.
24. Presentment Procedures -- Copies of a memorandum dated October, 1992, regarding the presentment of tort claims against state agencies under G.L. c. 258, § 4, have already been sent to agency counsel. Additional information and copies are available from AAG Bill Daggett, Managing Attorney of the Trial Division.
25. Chapter 30A/Administrative Law Training videotape -- (Contact: Sherrie Costa, Administrative Law Division)
26. "How to Define the Public Interest -- the Attorney General's Litigation Choices" videotape -- (Contact: Sherrie Costa, Administrative Law Division)

How Can We Help?

Are there areas not mentioned in our list of resources in which our advice could be helpful? For example, could you or other agency personnel benefit from written materials and/or training sessions concerning difficult employees and employment litigation? Conducting investigations? Evaluating tort claims? Please contact AAG John Bowman, Training Coordinator in the Government Bureau, if you would like to discuss your ideas along these lines.

How Can YOU Help?

Has your agency developed training materials or other resources that you think might be useful to other agencies? If so, please contact AAG John Bowman, and we will list and describe your item(s) in future issues of this Newsletter so that other agency counsel can contact you directly.

Also, you can help us by keeping us informed of anticipated or potential litigation. Please contact Judith Fabricant, Chief of the Government Bureau, or the appropriate division chief.

Our office is also available to review proposed regulations and legislation, to consider the potential for litigation and the defensibility of the regulations or legislation. We are also available to review notice forms and to consider the potential for litigation arising from such notices.

**ASSISTANCE AND CONTACTS IN THE
OFFICE OF THE ATTORNEY GENERAL**

The main telephone number for all extensions listed below
is (617) 727-2200.

Scott Harshbarger, Attorney General 2042
Thomas H. Green, First Assistant Attorney General 2057

Executive Bureau

Maurice Cunningham, Open Meeting/Public Records 3452

Government Bureau

Judith Fabricant, Chief 2068
Peter Sacks, Deputy Chief 2064
William Porter, Affirmative Litigation Coordinator 2062
Edward Rapacki, Appeals Coordinator 2082
John Bowman, Training Coordinator 3311
Jim Milkey, Director of Land Use/Environmental Projects.... 3347

Administrative Law Division

Judith Yogman, Chief 2066
Jonathan Abbott, Municipal Law Unit 2096
Judy Levenson, Opinions Coordinator 2087

Trial Division

Douglas Wilkins, Chief 3328
William Daggett, Managing Attorney 3327

Environmental Protection Division

Ann Berwick, Chief 3352
William Pardee, Chief Litigation Counsel 3353
Madelyn Morris, Senior Litigation Counsel 3350

Public Protection Bureau

Barbara Anthony, Chief 2925

Criminal Bureau

R. Michael Cassidy, Chief 2810
Mark Smith, Public Integrity Division Chief 2846

Family and Community Crimes Bureau

Diane Juliar, Chief 2878

Business and Labor Protection Bureau

Stuart Rossman, Chief 3232

Western Massachusetts Division (Springfield)

Edward Berlin, Chief (413) 784-1240

RESPONSE SHEET

We hope that you enjoyed this sixth issue of Attorney General Scott Harshbarger's Agency Counsel Newsletter. We have sent one copy to each agency on our mailing list. If your agency has more than one lawyer and would like to receive more than one copy of this and future issues, or if your agency does not yet appear on our mailing list, please fill in this form and return it to Marguerite Bosnian, Administrative Law Division, One Ashburton Place, 20th Floor, or telephone us at 727-2200 ext. 2070.

Also, if you have any comments or suggestions for topics to be addressed in future issues, please indicate them below.

Name of Agency: _____

1. Please send our agency ____ additional copies of this and future issues, at the following address:

2. Also, please send copies to the following address(es):

Send ____ copies to:

Send ____ copies to:

3. Comments and suggestions for topics to be addressed in future issues:

Thank you for your cooperation and your ideas.

